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JOSEPH F. SPANIOL, JR.  
CLERK

NO. 86-1771

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

STUDENT ROE, a Minor, By Her Next Friend  
and Natural Guardian, M. Roe  
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,  
SECRETARY OF EDUCATION, et al.,  
Respondents

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BRIEF IN OPPOSITION TO PETITION FOR WRIT  
OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE  
THIRD CIRCUIT

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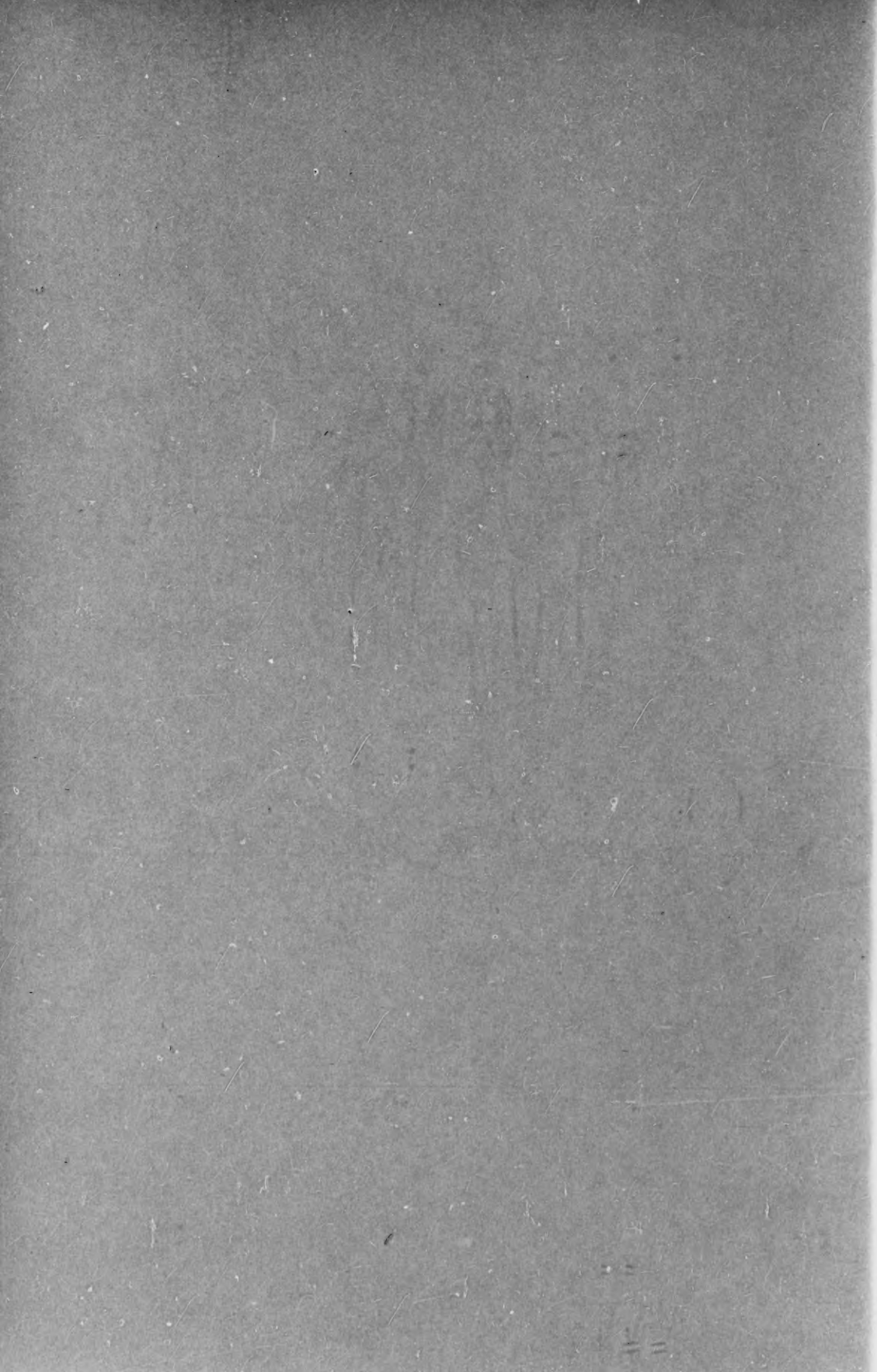
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## QUESTIONS PRESENTED

- I. Whether petitioner has a protected property interest in an educational program for gifted students which is protectible by due process?
- II. Whether, in light of petitioner's failure to establish the existence of a protected property interest, the courts below correctly declined to address the question of what process would be "due" in protecting it?
- III. Whether Pennsylvania's establishment of special educational programs for gifted students is rationally related to a legitimate state purpose?

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## JURISDICTION

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The order of the Court of Appeals for the Third Circuit affirming judgment on the pleadings for the Commonwealth of Pennsylvania officials was entered on February 2, 1987. The petition for writ of certiorari was docketed on May 1, 1987.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND REGULATIONS INVOLVED

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Pa. Stat. Ann. tit. 24, § 13-1371(1) (Purdon)(Supp. 1986) provides:

The term "exceptional children" shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes.

The regulation codified at 22 Pa. Code § 341.1(iv) provides in relevant part:



Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

## SUMMARY OF ARGUMENT

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This petition for a writ of certiorari raises no special or important issues for review, and decisions below are consistent with the decisions of this Court. The petition for writ of certiorari should be denied.

## ARGUMENT

- I. THERE ARE NO SPECIAL AND IMPORTANT REASONS WHY THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI.
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Petitioner, Student Roe, seeks to have this Court review a decision of the Court of Appeals which affirmed the United States District Court for the Eastern District of Pennsylvania's granting of judgment on the pleadings in favor of Commonwealth of Pennsylvania officials. Petitioner states no "special or important" reasons for review and decision by this Court. The petition for certiorari is nothing more than a request to have this Court make a third review of Student Roe's allegations. The Petition for a Writ of Certiorari should be denied.

II. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE COURTS BELOW CORRECTLY DETERMINED THE ISSUES RAISED BY THE PETITION.

A. Petitioner has No Property Interest In An Educational Program For Gifted Children.

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Pennsylvania law provides that students with an IQ of 130 or above "shall be assigned" to a program for the gifted. 22 Pa. Code § 341.1(iv), emphasis added. Petitioner concedes, however, that her IQ is, at most, 121. Pet. at 17, Pet. App. at 20a. The law provides that a "limited number" of such students "may" be assigned to a gifted program. 22 Pa. Code § 341.1(iv). Such an assignment is not, however, a matter of right, but is committed to the sound discretion of the local school district

and may be refused for any constitutionally permissible reason. Pet. App. at 20a-21a. As this Court has held, such a scheme creates no interest protected by the Due Process Clause, Olim v. Wakinekona, 461 U.S. 238, 249 (1983), and the courts below correctly rejected this claim. Pet. App. at 3a, 8a.

B. The Courts Below Correctly Declined to Address the Question of What Process Might Be Due to Protect a Nonexistent Interest.

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In a confused and convoluted argument, the petitioner says that her application for entry into a special educational program for gifted students should have been reviewed under a "least

restrictive alternative" standard. Pet. at 31-34. It is not at all clear what this means -- the petitioner is not institutionalized, and there is no suggestion in the record that she is subject to any "restrictions" -- but in any case there is no need to reach this question. As demonstrated in the proceeding section,--the petitioner's admission into such a program is not a matter of right, but is entrusted to the sound discretion of her local school district. There is therefore no occasion to consider what standard might apply if things were otherwise, and the courts below correctly refrained from doing so. Pet. App. at 9a, n.3.

C. The Establishment Of An Educational Program For Gifted Students Does Not Violate The Equal Protection Clause.

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The petitioner's final argument is that Pennsylvania, by establishing special educational programs for gifted students, has violated the Equal Protection Clause. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-35 (1973), however, this Court held that education is not a fundamental right. Accordingly, as held by the District Court and the Third Circuit, the classification of students as "gifted" or "non-gifted" for purposes of a special educational program need only meet the "rational relation" test. Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125 (1978).

To be constitutionally infirm under this standard, the gifted program regulations would have to be "so unrelated to any combination of legitimate purposes," Vance, supra, 440 U.S. at 97, that it can only be concluded that state officials acted irrationally. Accord, U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 179 (1980). However, this is clearly not the case. As the district court said, "surely, it is both rational and legitimate for Pennsylvania to provide special education to gifted children in order to develop the abilities of those students most likely to assume leadership roles in areas of endeavor which are intellectually demanding." Pet. App. at 12a. This challenge, then, is also without merit.



## CONCLUSION

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For the above reasons, the  
Petition for a Writ of Certiorari should  
be denied.

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